A **M/S ROYAL & SUN ALLIANCE INSURANCE (M) BHD**

v.

MOHD ARIF ABDUL HALIM

B HIGH COURT MALAYA, KANGAR
ZAMANI RAHIM JC
[CIVIL APPEAL NO: 12-20-2005]
22 JANUARY 2009

C ***ROAD TRAFFIC:*** *Insurance - Motor insurance - Claim for - Liability - Failure to prove delivery of certificate of insurance by insurer - Whether cover note produced a forgery - Whether pre-conditions of s. 96 of the Road Transport Act 1987 proved - Whether Sessions Court Judge erred*

D ***INSURANCE:*** *Claims - Motor insurance - Recovery action - Liability - Failure to prove delivery of certificate of insurance by insurer - Whether cover note produced a forgery - Whether pre-conditions of s. 96 of the Road Transport Act 1987 proved - Whether Sessions Court Judge erred*

E This was an appeal by the appellants, Royal & Sun Alliance Insurance (M) Bhd against the decision of the Sessions Court Judge giving judgment in favour of the respondent in a recovery action. Briefly, the plaintiff/respondent was involved in a road accident with a motorcar, BDJ 4684. Pursuant to the accident the plaintiff filed a running down action against the driver and the F registered owner of the said motorcar and obtained a judgment in default against the driver and the registered owner of the said motorcar. The damages were subsequently assessed and the plaintiff was awarded general damages in the sum of RM24,000 and special damages in the sum of RM950 together with interests G and costs. The plaintiff contended that the defendants/appellants were the insurers of motorcar BDJ 4684 and further contended that the defendants were responsible to satisfy the judgment obtained by the plaintiff pursuant to the provision of s. 96 of the Road Transport Act 1987 (RTA). The defendants/appellants H however denied that they had issued any cover note to insure the said motorcar, BDJ 4684. After a full trial before the Sessions Court Judge, the judgment was recorded in favour of the plaintiff/ respondent. Dissatisfied with the said decision, hence this appeal by the defendants/appellants.

I

Held (setting aside decision of Sessions Court Judge; allowing appellant/defendant's appeal with costs): A

(1) In attempting to prove the pre-condition of s. 96 of the RTA 'a certificate of insurance has been delivered under subsection (4) s. 91 to the person by whom the policy has been B effected,' the plaintiff had called two JPJ officers who testified that from the record kept by JPJ, the defendants were the insurers of motorcar BDJ 4684 *vide* cover note number 217007. The JPJ computer slip was produced and marked as exhibit. Certainly, the computer slip was not evidence of any C delivery of a certificate of insurance by the defendants to the plaintiff as required under s. 96(1). (para 16)

(2) The onus was on the plaintiff to call the registered owner (Rokiah Ahmad) to give evidence that a certificate of insurance had actually been delivered to the registered owner of D motorcar BDJ 4684. But the plaintiff failed to do so and thus failed to discharge the onus placed on him. An adverse inference under s. 114(g) Evidence Act 1950 had been activated against the plaintiff in this case, as he had failed to E call the registered owner, Rokiah bt Ahmad, to take the witness stand. In the premise, the plaintiff had failed to prove that 'a certificate of insurance has been delivered under subsection (4) of s. 91 to the person by whom the policy has been effected.' (para 19) F

(3) The learned Sessions Court Judge had erred in fact and in law when she relied on the evidence of SP1 and SP2 who allegedly said cover note numbers 217007 was issued by the defendant. On the contrary their evidence showed that JPJ did not know whether the said cover note was false or otherwise G as it was merely produced at JPJ's office for renewal of road tax only. The JPJ only recorded whatever particulars appeared on the face of the said cover note without ascertaining whether it was false, forged or otherwise. (para 31) H

(4) The learned Sessions Judge also erred in fact and in law when she said that the defendants had failed to prove the said cover note was false contrary to the evidence of DW1, DW2 and DW3, the book/register D13, the police report and the advertisement 'HCK2'. These *viva voce* evidence and the I documentary evidence showed, without any slightest doubt,

A that the defendant had never issued the cover note which carried serial numbers which began with digit '2'. Thus, the cover note numbers 217007 was indeed a forgery. (para 32)

(5) In the course of the trial, the plaintiff had never given
B evidence, nor attended the trial. The plaintiff had therefore failed to prove another pre-condition under s. 96(1) RTA that he was 'the person(s) entitled to the benefit of the judgment.' (paras 33, 34 & 35)

C *[Plaintiff to repay all the damages received from defendants arising from the impugned decision of Sessions Court Judge.]*

Case(s) referred to:
Capital Insurance Berhad v. Kasim Mohd Ali [1996] 3 CLJ 19 CA ***(refd)***
Mohd Sarani Rasman v. Pan Global Insurance Sdn Bhd [2001] 1 LNS 206
D *HC* ***(refd)***
Mustafa Man & Anor v. Pan Global Insurance Bhd [2003] 8 CLJ 390 HC ***(refd)***
Othman Abd Samad v. Safety Life & General Insurance Sdn Bhd [1996] 1 LNS 458 ***(refd)***
The People's Insurance Co (M) Sdn Bhd v. V Narayani Raman [2002] 1
E *LNS 281* ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Road Transport Act 1987, ss. 91, 96(1)

F *For the appellants - Khairudin Alaudin; M/s Bala Mahesan & Khairudin*
For the respondent - Mazlan Mohd Noor; M/s Nijar, Kumar, Netto & Partners

Reported by Suhainah Wahiduddin

G

JUDGMENT

Zamani Rahim JC:

H **Introduction**

[1] This is an appeal by the appellants, Royal & Sun Alliance Insurance (M) Bhd against the decision of the learned Sessions Court judge, Kangar giving judgment in favour of the respondent
I in a recovery action.

[2] On 31 July 2008 after going through the written submissions and the authorities submitted by both the appellant and respondent herein, I allowed the appellants' appeal with cost. The decision of the learned Sessions Court judge was thus set aside.

[3] Dissatisfied with any decision, the respondent has filed a notice of appeal to the Court of Appeal.

Brief Facts And Background Of The Case

[4] The brief facts and background of the case are as follows:

[5] The plaintif was involved in a road accident with a motorcar, BDJ 4684 on 2 August 1999. Pursuant to the accident, the plaintiff had filed a running down action at Kangar Magistrate Court *vide* Summons No. 73-96-01 against the driver and the registered owner of the motorcar, BDJ 4684.

[6] On 30 October 2001 the plaintiff had obtained a judgment in default against the driver and the registered owner of the motorcar, BDJ 4684. The damages were subsequently assessed and on 16 July 2002 the plaintiff was awarded general damages in the sum of RM24,000 and special damages in the sum of RM950 together with interest and costs.

[7] The plaintiff contended that the defendants, Messrs. Royal & Sun Alliance Insurance (M) Bhd were the insurers of motorcar, BDJ 4684 and further contended that the defendants were responsible to satisfy the judgment obtained by the plaintiff *vide* Summons No. 73-96-01 pursuant to the provision of s. 96 of the Road Transport Act 1987 (RTA).

[8] The defendants (ie, the appellants herein) however, in their defence denied that they had issued any cover note to insure the said motorcar, BDJ 4684.

[9] On 4 September 2002, the plaintiff had filed recovery action against the defendants *vide* Summons No. 52-155-02 claiming the sum of RM24,950 pursuant to s. 96 of the RTA.

[10] After a full trial before the learned Sessions Court judge, the judgment was recorded in favour of the plaintiff on 25 August 2005.

[11] Dissatisfied with the said decision, hence this appeal by the defendants. This appeal is by way of re-hearing and where expedient the judgment of the learned Sessions Court judge will be referred to.

Section 96(1) RTA

[12] The plaintiff claim to recover the judgment sum of RM24,950 from the defendants is founded under s. 96(1) of the RTA which provides:

> **If after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom the policy has been effected,** judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person covered by the terms of the policy, then notwithstanding that the insurer may be entitled to avoid or cancel the policy or may have avoided or cancelled the policy, the insurer shall subject to this section pay to the **persons entitled to the benefit of the judgment** any sum payable thereunder in respect of the liability including any amount payable in respect of costs and any sum payable in respect of interest on the sum by virtue of any written law relating to interest on judgments.

[13] The pre-condition required to be proved by the plaintiff is that "a certificate of insurance has been delivered under sub-section (4) of s. 91 to the person by whom the policy has been effected". On this issue, in the Court Appeal case of *Capital Insurance Berhad v. Kasim Mohd Ali* [1996] 3 CLJ 19. Siti Norma Yaacob JCA said at p. 24.

> Coming now to the merits of the appeal, the respondent's cause of action against the appellant is founded under s. 96(1) of the Road Transport Act 1987 under which an insurer is duty bound to satisfy any judgment obtained against any person insured by the insurer in respect of third party risks. However the liability to satisfy such judgment is conditional upon the insurer having delivered a certificate of insurance under s. 91(4) of the same Act to the person by whom the policy has been effected. It is the appellant's defence that it never issued or delivered a certificate of insurance to the owner of the motor-vehicle that collided into the respondent.

The respondent's reply to this is that such a certificate was issued as is evidenced by a letter written by the Registrar and Inspector of Motor Vehicles, Selangor (RIMV) dated 2 March 1980 to the respondent's solicitors in answer to the latter's enquiry as to the status of the motor-vehicle. *Section 96(1) speaks of the delivery of a certificate of insurance by an insurance company to the insured as a precondition before liability can be pinned against the insurers. The certificate must therefore be issued and delivered by the appellant to the insured and not by anybody else.*

[14] In another case of *Mohd Sarani bin Rasman v. Pan Global Insurance Sdn. Bhd* [2001] 1 LNS 206, KC Vohrah J said.

Mohd. Sarani's cause of action against Pan Global is founded under s. 96(1) of the Act. Under the provision an Insurance Company is duly bound to satisfy any judgment obtained against any person insured in respect of third party risks. The liability to satisfy such judgment is conditional upon the insurer having delivered a policy of insurance under s. 91(4) to the person by whom the policy had been effected. The trial has shown such a certificate was never issued. Pan Global is therefore not under any liability to satisfy the judgment obtained by him against to owner of the lorry.

[15] In the same vein, in the case of *Mustafa Man & Anor v. Pan Global Insurance Bhd* [2003] 8 CLJ 390 Suriyadi Halim Omar J said:

To wind up the matter under discussion, as the law imposes a statutory liability on the insurers to satisfy a third party claim, the latter, in this case the *plaintiffs, thus must prove to the court that all the preconditions of s. 96(1) had been fulfilled. It must be done within the four walls of the written law, and not on non-established principles.* However sympathetic I may be of the plaintiffs predicament, with no other recourse to alleviate their dire needs, except hoping to exact something from the defendant, but without the availability of cogent evidence before me, it was with regret that I have to reject their claims.

... With the above factual findings that the plaintiffs had failed to prove issuance of the certificate of insurance pursuant to s. 96(1) of the Road Transport Act by the defendant, let alone delivery, I had no compunction in rejecting the plaintiffs' case against the defendant with costs.

[16] In this case, in attempting to prove the precondition of s. 96 of the RTA, that is, "a certificate of insurance has been delivered under subsection (4) s. 91 to the person by whom the policy has been effected", the plaintiff had called two JPJ officers

who testified that from the record kept by JPJ, the defendants were the insurers of motorcar, BDJ 4684 *vide* cover note number 217007. The JPJ computer slip was produced and marked as exhibit. Certainly, the computer slip is not evidence of any delivery of a certificate of insurance by the defendants to the plaintiff as required under s. 96(1). In *Capital Insurance Bhd, supra,* Siti Norma Yaacob JCA said:

> The letter from the RIMV does not fulfill the requirements of s. 96(1). On the face of it, it merely states that the appellant had issued a policy to the owner of the motor-vehicle, BBQ 7196 to cover the period from 17 October 1985 to 16 October 1986. The policy may well have been issued by the appellant but the letter from the RIMV is not evidence of any delivery of a certificate of insurance by the appellant to the insured as required by s. 96(1). To regard that it did as did the trial Judge is totally erroneous.

[17] And *The People's Insurance Co. (M) Sdn. Bhd v. V. Narayani a/p Raman* [2002] 1 LNS 281 Su Geok Yiam, JC (as she then was) said:

> In the instant case it is clear from the evidence that has been reiterated in this judgment that the respondent had failed to prove that a certificate of insurance had in fact been delivered to the said Abdul Aziz by the appellants before the default judgment was entered against the said Abdul Aziz. The appellants were also able to prove as a fact that the policy number of the alleged insurance policy or cover note in respect of the said motor taxi could not have been issued by the appellants because of the many discrepancies as testified by the appellants' witnesses DW1 and DW2. The learned Magistrate should have ruled that the oral evidence of SP2, the record officer of the JPJ, Perak was insufficient to prove that a certificate of insurance had been delivered to the said Abdul Aziz and, accordingly, dismissed the respondent's claim.

[18] The defendants denied that they had ever issued a cover note No: 217007 or issued a certificate of insurance which purportedly insured motorcar, BDJ 4684. The defendants had called three of their officers SD1, SD2 and SD3 to give evidence.

[19] If the plaintiff is adamant and insists that a certificate of insurance had actually been delivered to the registered owner of motorcar, BDJ 4684, the onus is on him to call the registered owner (that is, Rokiah bt. Ahmad) to give evidence. But the plaintiff failed to do so and thus failed to discharge the onus

placed on him. In the case of *Othman bin Abd Samad v. Safety Life & General Insurance Sdn. Bhd* [1996] 1 LNS 458, the court held that an adverse inference had been raised against the plaintiff for failure to produce any evidence from the agency representative that the disputed cover note was indeed issued. On the above principle, an adverse inference under s. 114(g) had been activated against the plaintiff in this case, as he had failed to call the registered owner, Rokiah bt Ahmad to take the witness stand. In the premise, the plaintiff had failed to prove that "a certificate of insurance has been delivered under sub-section (4) of s. 91 to the person by whom the policy has been effected".

Consideration Of The Plaintiff's Evidence By The Sessions Court Judge

[20] The learned Sessions Court judge had made several flaws in assessing the evidence of the plaintiff, SP2 as follows:

i) when she decided at pp. 88 dan 89 of the appeal record that the evidence of SP2 showed that the cover note numbers 217007 was issued by Sun Alliance Insurance, whereas his evidence merely showed that the cover note purportedly issued by Sun Alliance Insurance was presented at the JPJ Wilayah's office for purposes of renewal of the road tax.

ii) When she said at p. 90 of the appeal record that the cover note numbers, 217007 had been delivered by the plaintiff, whilst there was no such evidence.

iii) She failed to make specific finding that "a certificate of insurance has been delivered under sub-section (4) of s. 91 to the person by whom the policy has been effected"

[21] It would appear from her judgment at p. 95 of the appeal record that the plaintiff had failed to prove the aforesaid pre-condition of s. 91 of the RTA. The learned Sessions Court judge went on to hold at p. 96 of the appeal record that:

> Defendan telah ketepikan haknya untuk menyatakan yang cover note nombor 217007 tidak diserahkan kepada Rokiah Ahmad iaitu pemilik kenderaan BDJ 4684.

[22] Again it would appear that the learned Sessions Court judge had reversed the onus or burden of proof from the plaintiff to the defendants. It is crystal clear from cases *Capital Insurance Bhd, supra, Mohd Sarani bin Osman, supra* and *Mustafa Man & Anor,*

A *supra*, it is incumbent upon the plaintiff to prove that the certificate of insurance had been delivered to Rokiah Ahmad and not the defendants to do so.

[23] Finally, the learned Session Court judge too erred in fact and
B in law when she decided at pp. 97 and 98 of the appeal record that the defendant should take steps to deny that they were the insurers of motorcar, BDJ 4684 when the Summons No. 73-96-07 was filed and failure for the defendants' to do so, effectively means that they had waived their right to assert that they were
C not the insurers of the motorcar, BDJ 4684 now, without citing any authority to support her decision thereof.

Consideration Of The Defendants' Evidence By The Sessions Court Judge

D **[24]** At the end of the plaintiff's case, the defendants are entitled to submit a no case to answer without calling any evidence as the plaintiff had failed to produce evidence to show that the defendants had issued the cover note and delivered the same to Rokiah bt. Ahmad.

E

[25] Instead the defendants chose to call evidence and had called three witnesses to show that the defendants had not issued any cover note which insured the motorcar, BDJ 4684.

F **[26]** The evidence of Wong Mun Kong, DW2, the defendants' manager showed that the defendants were fully aware that the cover note with the serial numbers which began with digit "2" were rife circulating in public, but the defendants were yet to issue the cover note with such serial numbers which began with digit "2". The said cover note with serial numbers 217007 was patently
G false. The defendants had taken positive steps not to issue any cover note with serial numbers which began with digit "2" and instead the serial numbers were skipped and jumped straight to serial numbers which began with digit "3" (see p. 51 to 53 of the
H appeal record). In other words, the defendants had never issued the cover note with serial numbers which begin with digit "2". At the risk of repetition, the cover note with serial numbers 217007 (which begin with digit "2") allegedly issued by the defendants to insure motorcar, BDJ 4684 was untrue or false.

I

[27] The defendants too had taken steps to cause an advertisement in the form of a general notice be placed in the New Straits Times dated 1 June 1999 (Tuesday), exh. "HCK2" to inform the general public that the cover notes with serial numbers 95-202001 to 95-299999 were forged or false. The general notice, exh. "HCK2" is depicted below:

(LOGO)

SUN ALLIANCE
MALAYSIA

GENERAL NOTICE

We have detected forgery of our Company's Motor Insurance Cover Notes. These forgeries are readily identifiable by the following serial numbers that appear on the Cover Notes. They are:

95 - 202001 to 93 - 299999
96 – 100001 to 96 – 199999
97 – 100001 to 97 – 199999

Cover Notes of the following series have been reported lost:

99 – 422501 to 99 – 422510

These forged and lost cover notes are null and void. Owners of vehicles in possession of these Motor Insurance Cover Notes are without valid insurance and are advised to report to the authorities concerned.

Sun Alliance Insurance (M) Sdn. Bhd. (88176-H)
1st floor, Plaza See Hoy Chan
GPO Box No: 12358, 50776 Kuala Lumpur
Tel. No: 03-2387977

[28] The plaintiff's counsel had agreed to the admission of exh. "HCK2" above but the counsel said its contents were subject to argument. However, no argument was advanced by the learned counsel to dispute its contents. On this issue, the learned Session Court judge had this to say at pp. 92-94 of the appeal record:

A Di sini saya dapati yang tidak ada tarikh tepat diberikan oleh Defendan bila cover note bermula angka 2 itu tidak dikeluarkan. Tanpa ada tarikh yang tepat maka Mahkamah ditinggalkan dalam kekeliruan dan tidak dapat memberi pertimbangan yang sewajarnya.

B **[29]** The above finding by the learned Sessions Court judge was bizarre to say the least. How on earth were the defendants able to give the exact date as the defendants had never issued the serial numbers which began with digit "2" in the first place!

C **[30]** The defendants too called Kwong Wah Sing, DW3, a Credit Control Manager who satisfied that the defendants had never issued the cover notes which began with digit "2" to corroborate his evidence. DW3 had produced a register or book, D13 which showed that cover notes with serial numbers which D began with digit "2" was never issued. On DW3's evidence, the learned Sessions Court judge remarked as follows:

DW3 pula cuba membuktikan pada Mahkamah bahawa cover note nombor 217007 tidak dikeluarkan oleh Defendan dengan mengemukakan buku daftar dan ditandakan D13. D13 disokong E oleh keterangan DW3 yang cover note bermula dengan siri nombor 2 tidak dikeluarkan oleh syarikat Defendan. Walau bagaimanapun mengikut keterangan SP1 dan SP2, cover note nombor 217007 telah dikeluarkan atas kenderaan BDJ 4684. Adalah beban atas Defendan untuk membuktikan yang cover note F tersebut tidak dikeluarkan.

(see p. 94 of appeal record)

[31] The learned Sessions Court judge had erred in fact and in law when she relied on the evidence of SP1 and SP2 who G allegedly said cover note numbers 217007 was issued by the defendant. On the contrary their evidence showed that JPJ did not know whether the said cover note was false or otherwise as it was merely produced at JPJ's office for renewal of road tax only. And nothing more. The JPJ only recorded whatever particulars H appeared on the face of the said cover note without ascertaining whether it was false, forged or otherwise.

[32] The learned Sessions Court judge also erred in fact and in law when she said that the defendants had failed to prove the said I cover note was false contrary to the evidence of DW1, DW2 and DW3 and the book/register D13, the police report and the advertisement "HCK2". These *viva voce* evidence and the

documentary evidence showed, without any slightest doubt, that the defendant had never issued the cover note which carried serial numbers which began with digit "2". Thus, the cover note numbers 217007 was indeed a forgery.

[33] Further, another pre-condition under s. 96(1) RTA to be proved by the plaintiff is that he was the "person(s) entitled to the benefit or the judgment."

[34] In the course of the trial, the plaintiff had never given evidence, nor attended the trial. That being the case, there was no evidence adduced that the plaintiff was the very same person who obtained the judgment *vide* Summons No: 73-96-01 at the Magistrate Court, Kangar.

[35] The plaintiff had, therefore, failed to prove the second pre-condition that he was the "the person(s) entitled to the benefit of the judgment"

Conclusion

[36] From the aforesaid grounds, I have no hesitation to set aside the decision of the learned Sessions Court judge dated 25 August 2005. Accordingly, I allowed the defendants' appeal with costs. I, too, ordered the plaintiff to repay all the damages that he had received from the defendants arising from the impugned decision of the learned Sessions Court judge dated 25 August 2005.